2000

State of Utah v. Gino Maestas : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
GINO MAESTAS,	:	Case No. 20000094-SC Priority No. 10
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Interlocutory appeal from the Order entered January 5, 2000, by the Honorable Robert K. Hilder, Judge of the Third Judicial District Court in and for Salt Lake County, State of Utah, granting the State's motions to exclude expert testimony on eyewitness identification and to allow presentation of voluntary statements of Defendant during the State's case-in-chief.

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TEXT OF ADDITIONAL STATUTES AND RULES

The text of Utah Code Ann. § 64-13-20(3) (2000) and Article I, section 28, Utah Constitution is in Addendum A.

POINT I. THE TRIAL COURT'S RULING THAT MAESTAS CANNOT PRESENT EXPERT TESTIMONY IN SUPPORT OF HIS IDENTIFICATION DEFENSE SHOULD BE OVERTURNED.

The state incorrectly claims that State v. Long, 721 P.2d 483, 487-494 (Utah 1986), provides the complete solution to problems caused by the unreliability of identification testimony and allowing expert testimony would therefore involve a departure from precedent. State's brief ("S.B.") at 20-21. In Long, this Court did not address the issue of whether expert testimony should be admitted when a cautionary instruction is given. Instead, the only issue before this Court was whether Long's conviction should be reversed because the trial court refused to give a cautionary instruction. Id. at 487. Despite the state's tortured attempt to demonstrate that this Court resolved the current issue in Long (see S.B. at 21, n.12), a review of Long and the decisions leading up to it establish that Long did not resolve this issue.

The state asks this Court to regress to the pre-Long approach by relying on cases which embrace that outmoded approach in determining whether expert testimony should be admitted in an eyewitness identification case. See S.B. at 22, n.13. In fact, none of the cases cited by the state for its proposition that a cautionary instruction serves the same interests as expert testimony and expert testimony is therefore unnecessary, discuss at length the problems inherent in eyewitness identification testimony outlined in Long. See S.B. at 22, n.13; see e.g., Lewis v. State, 572 So.2d 908, 911 (Fla. 1991) (per curiam) (without discussing the problems with identification testimony, court relied on a 1983 case and the ability of juries to perceive and remember in concluding the trial court did not abuse its discretion in refusing expert testimony); Commonwealth v. Kent, 696 N.E.2d 511, 517-18 (Mass. 1998) (without embracing concerns in Long, court holds that court properly excluded expert testimony because it was "'elementary, basic, and parallels to a great extent the instructions the jurors receive from the judges in criminal cases'").

The state argues that State v. Buell, 489 N.E.2d 795, 803 (Ohio 1986), which held that expert testimony is admissible, actually supports the state's argument because the majority concluded the error was harmless. S.B. at 22-23. Although the majority indicated that cross-examination, closing argument and an instruction helped in alerting the jury to factors which affect reliability, it also pointed out that "evidence of defendant's guilt was based primarily on physical evidence rather than identification testimony."

Buell, 489 N.E.2d at 804.[1] A harmless error review is not appropriate here because of the interlocutory nature of the case and also because "the other evidence supporting the conviction [is not] conclusive." State v. Maestas, 1999 UT 32, 984 P.2d 376, ¶35.

People v. Brooks, 490 N.Y.S.2d 692, 699, 702 (N.Y. 1985) also supports Maestas' position because while the expert could not opine as to whether a witness was credible, due process required the expert be permitted to testify regarding the factors which affect the reliability of the identifications.

The state incorrectly argues that substantial non-identification evidence linking Maestas to the crimes exists because some of the witnesses testified that Maestas' voice or gait was similar to that of the robber. S.B. at 23, n.14. Voice identification and descriptions of how a person walks are identification testimony and therefore do not rise to the level of substantial, independent corroborating evidence. See generally Long, 721 P.2d at 496 (cautionary instruction includes option of indicating that witness may use sense other than sight to make an identification). Moreover, the remainder of the evidence which supported Maestas' conviction was circumstantial and "not overwhelming or conclusive." Maestas, 1999 UT 32, ¶¶35-36.

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[1] One of the justices focused on the majority's resolution of the expert identification testimony issue and indicated that he would reverse the capital homicide conviction based on the error in precluding the defendant from presenting expert testimony on factors which affected the reliability of identifications. Buell, 489 N.E.2d at 819 (Connors, J., dissenting).

An instruction, which provides guidelines for the jury but is not evidence, does not serve the same function as expert testimony and fails to further Maestas' due process right to present a defense. See A.B. at 28-30. Additional examples, not outlined in A.B. at 28-30, support the notion that an instruction is not a substitute for expert testimony: (1) the Long instruction tells the jury that it must consider whether the witness had an adequate opportunity to observe, whereas the expert testimony outlines details regarding what the studies have shown to be an adequate opportunity; (2) the instruction tells the jury to consider "the extent to which the actor's features were visible and undisguised"; the expert testimony indicates that "even minor changes [in appearance] can significantly reduce the likelihood of later identification" and that subsequent identification without the disguise can be as low as 9% (Dr. Dodd's letter ("Dodd") at 2); (3) the instruction tells the jury to consider the length of time the witnesses observed the actor, but it does not tell the jury what length of time the research has shown to be adequate; the testimony would tell the jury that studies show that less than a minute makes correct identification less likely, and witnesses often overestimate the amount of time they viewed the actor (Dodd at 3).

The *Ramirez* hearing, cross-examination and closing arguments are also not a substitute for expert testimony regarding the factors affecting the reliability of identification testimony admitted at trial. The *Ramirez* hearing did not impact on the identification testimony which was admitted and did not further Maestas' right to present evidence in support of his defense. See A.B. at 28-30. Cross-examination allows defense

counsel to attempt to reach the inconsistencies and factors which undercut the reliability of identifications but does not establish the significance of those factors and inconsistencies; expert testimony is necessary to demonstrate such significance for the jury. Closing argument is not evidence and the jury is instructed that it is merely argument and should not be considered as evidence. In this case where identification is the sole issue at trial and little other evidence links Maestas to the crimes, expert testimony is critical to Maestas' presentation of his defense.

POINT II. THE RULING THAT THE STATE MAY INTRODUCE AT RETRIAL INCRIMINATING STATEMENTS MADE AS PART OF THE SENTENCING PROCESS SHOULD BE OVERTURNED.

A. THE STATEMENTS IN THE PRESENTENCE REPORT ("PSR") ARE NOT ADMISSIBLE AT RETRIAL.

The state argues that Utah Code Ann. § 64-13-20(3)(a) (2000) somehow expands the limitation of the plain language of Utah Code Ann. § 77-18-1(5)(d) (1999), and permits a judge to order the use of PSR's for any purpose, not just sentencing or correctional purposes. S.B. at 46-48. The state's interpretation does not comport with section 64-13-20(3)'s plain language and cannot be reached by accepted methods of statutory construction. Section 64-13-20(3)(b) clarifies that PSR's can be used only by courts for sentencing purposes or by the Department of Corrections ("DOC") or Board for correctional purposes. Subsection 3(a) indicates that PSR's are protected and can be released either pursuant to DOC rules or, in the absence of such rules, by court order.

The entire subsection 3 read together limits the court order allowing release of PSR's referred to in subsection 3(a) to orders releasing PSR's for sentencing or correctional purposes. Additionally, the chapter in which section 64-13-20 is found deals with the DOC and prison; it is therefore evident that section 64-13-20(3) is concerned with the use of PSR's in the correctional system and does not extend the use beyond that context.

The state alternatively claims that even if sections 77-18-1(5)(d) and 64-13-20 preclude the use of the PSR at retrial, Maestas waived that protection when he "substantially repeat[ed] his presentence statements at the sentencing hearing." S.B. at 47. This claim fails because (1) Maestas did not substantially repeat the detail of his statements made in the PSR and instead made a general statement of responsibility at sentencing (see Addendum I to A.B.); in fact, if Maestas' statements at sentencing were substantially similar to those in the PSR, the state would have no need to use the PSR statements at retrial; (2) even if Maestas had substantially repeated his statements, the relevant statutes and the policy they serve are best furthered by not allowing use of PSR statements at retrial; the goal of a full and fair sentencing hearing with complete information, including the defendant's assessment of the offense, would be unattainable if PSR's were freely disseminated after being discussed at sentencing[2]; (3) because PSR's

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[2] In United States Department of Justice v. Julian, 486 U.S. 1, 12 (1988), the Court recognized that federal courts are reluctant to disclose contents of PSR's beyond the intended use because of the chilling effect of such disclosure on the willingness of individuals to give information and because of the need to protect the confidentiality of the report.

are necessarily discussed as part of sentencing, Maestas' reference to the PSR and general reiteration of the statements therein did not waive the protection afforded such reports: the protection afforded PSR's would be meaningless if a defendant could waive that protection by discussing the PSR at sentencing; and (4) just as Maestas did not waive his right against self-incrimination when he spoke at sentencing, he did not knowingly and voluntarily waive the statutory protection afforded PSR's.

B. MAESTAS' STATEMENTS MADE AS PART OF THE SENTENCING PROCESS ARE NOT ADMISSIBLE AT RETRIAL.

Relying essentially on the Harvey cases, Harvey v. State, 835 P.2d 1074 (Wyo. 1992) (Harvey I); Harvey v. Shillinger, 893 F.Supp. 1021, 1024-30 (D. Wyo. 1995) (Harvey II); Harvey v. Shillinger, 76 F.3d 1528, 1534-37 (10th Cir. 1996) (Harvey III), and McGautha v. California, 402 U.S. 183 (1971), *vacated* 408 U.S. 941 (1972), the state claims pertinent authority supports its claim that admission of Maestas' sentencing statements does not violate due process or the privilege against self-incrimination. S.B. at 29-31. The cases cited by the state are not directly on point, however, and fail to provide convincing and reasoned analysis in support of the state's position.

The Harvey line of cases involved significantly different circumstances from those in the present case and therefore provide little guidance. First, Harvey's statements were considered voluntary because he *conceded* that they had been voluntarily made. Harvey III, 76 F.3d at 1536. In addition, unlike Utah where a defendant can be sentenced

more harshly if he does not take responsibility for a crime, Harvey could not have been penalized for remaining silent at sentencing. In fact, the Harvey I court recognized that incriminating statements made at sentencing would not be voluntary if a defendant could be penalized for silence. Harvey I, 835 P.2d at 1083.

In addition, Harvey's statements knowingly waived the privilege because "Harvey knew that anything he said could be used as evidence against him." Harvey III, 76 F.3d at 1536. Harvey's sentencing statements were made under oath and were not used in the same case after a reversal on appeal. By contrast, Maestas was not under oath and the statements are to be used in the same case after his convictions were reversed on direct appeal. Given the uncertainty in the law in this area, it cannot be presumed that Maestas knew that these statements could be used at retrial.

McGautha, 402 U.S. at 213-220,[3] extended the long-established rule that a defendant who testifies at trial waives the right against cross-examination to trials where guilt and punishment are determined in a single proceeding. The analysis and policy concerns in McGautha were different from those here; the Court was not concerned with whether, under the totality of circumstances, the privilege had been waived when a defendant made an unsworn statement at sentencing. Instead, the McGautha court

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[3] Crampton v. Ohio was decided with McGautha. Although the Fifth Amendment discussion in McGautha refers to Crampton's case, Appellant uses the official citation, McGautha v. California, throughout this brief. McGautha was vacated on rehearing in light of Furman v. Georgia, 408 U.S. 2726 (1972).

focused on whether to extend the established rule that a defendant who testifies at trial can be cross-examined, to trials where guilt and punishment were decided at the same time. Given the distinct focus in McGautha and the evolution in the law which precludes such unitary proceedings in capital cases, McGautha provides little support for the state.[4]

By contrast, Appellant provides strong support for not admitting his sentencing statements at retrial. Among the cases supporting Maestas' analysis are State v. Drake, 552 A.2d 780 (Vt. 1988) (defendant's allocution statements are not admissible at subsequent proceedings); Mitchell v. United States, 526 U.S. 314 (1999) (guilty plea does not waive privilege against self-incrimination for sentencing purposes); State v. Sargent, 762 P.2d 1127 (Wash. 1988) (admission of statements made to presentence investigator at retrial violated the Fifth Amendment); and even Harvey I, 835 P.2d at 1083 (recognizing that Fifth Amendment would be violated by admission of defendant's statements made at sentencing if sentencer could have imposed harsher sentence if defendant remained silent). Due process and the Fifth Amendment require that the state not be allowed to use Maestas' sentencing statements to prove its case at retrial.

1. Maestas' Statements Did Not Knowingly and Voluntarily Waive the Privilege Against Self-incrimination.

a. *Maestas' Incriminating Statements Were Compelled Because He Could Be Sentenced More Harshly If He Did Not Confess.*

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[4] State v. Kelbach, 461 P.2d 297 (Utah 1969), *vacated* 408 U.S. 935 (1972), with no analysis, reached a conclusion similar to that in McGautha. Kelbach provides no guidance for the same reasons that McGautha does not provide guidance in this case.

Statements are not voluntary when the defendant does not have a meaningful choice between speaking and remaining silent; in other words, statements are not voluntary where a defendant may be penalized for exercising the privilege against self-incrimination. See United States v. Perez-Franco, 873 F.2d 455, 463 (1st Cir. 1989) (citing inter alia Minnesota v. Murphy, 465 U.S. 420, 429 (1984)). For example, statements to a presentence investigator taking responsibility for crimes which were dismissed in a plea bargain are compelled, not voluntary, if the defendant will be penalized under sentencing guidelines for not taking such responsibility. See Perez-Franco, 873 F.2d at 463; see also Lefkowitz v. Cunningham, 431 U.S.801 (1977) (if government penalizes individual for exercising privilege, any statements made by individual are compelled); Gardner v. Broderick, 392 U.S. 273, 278-29 (1968) (requiring officer to make statements to grand jury or lose his job violated privilege).

In Harvey I, 835 P.2d at 1083, the court acknowledged that its holding that statements made at sentencing were admissible in a future trial on a different charge would not apply if the defendant had been required to take responsibility for the crime at sentencing in order to receive a more lenient sentence. Id. The reason a confession made at sentencing in the hope of leniency would not be admissible is that such a statement "would amount to 'genuine compulsion of testimony' in violation of the right against self-incrimination." Id. (citations omitted).

At the sentencing in this case, the state argued that the eight five-to-life sentences

should run consecutively and that the judge had the option of imposing the one-year firearm enhancement or the greater enhancement that "could be as much as five years" (R. 537). Immediately after the prosecutor argued for this harsh sentence, the trial judge asked Maestas whether he had a statement to make (R. 537). Maestas responded by taking responsibility for the crimes and asking for leniency (R. 537-38). In addition to allowing a trial judge to impose a harsher sentence based on a defendant's failure to take responsibility for a crime (State v. Sibert, 310 P.2d 388, 393 (Utah 1957)), this Court has held that a defendant's acceptance of responsibility is a factor which the trial court should consider in determining whether to impose consecutive sentences. See State v. Galli, 967 P.2d 930, 938 (Utah 1998) (overturning consecutive sentences based in part on defendant's acceptance of responsibility). Unlike the defendant in Harvey I, Maestas was compelled to make incriminating statements at sentencing because by doing so, he increased the possibility that he would receive concurrent sentences, or even probation, as well as the lesser firearm enhancement.[5]

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[5] The state's argument throughout its brief is premised for the most part on the assumption that Maestas' incriminating statements at sentencing are an accurate reflection of the facts, and that because Maestas confessed at sentencing after denying involvement at trial, the due process requirement that the state prove its case beyond a reasonable doubt through its own resources, the privilege against self-incrimination, and the fairness protections afforded defendants have no application in this case. S.B. at 13, 28, 41, 49. In fact, the state argues that fairness requires that the sentencing statements be admitted at trial because Maestas "lied to the jury", but later "sought leniency from the trial court by admitting he committed the offenses." S.B. at 49.

Although the state assumes the allocution statements are accurate, the testimony at trial was made under oath whereas the statement at sentencing was not (R. 537). Because

Despite recent Utah case law which indicates that a defendant's acceptance of responsibility weighs significantly in favor of concurrent sentences, the state argues that Maestas' statements were not compelled because he had only a "dim hope" of better treatment. S.B. at 41-2, n.19. The record demonstrates, however, that the trial judge ordered that only counts I and II were to be served consecutively whereas the remaining counts were to be served concurrently; moreover, the trial judge imposed the lesser one-year firearm enhancement (R. 114-129). The fact that the trial judge did not impose the absolute maximum demonstrates that Maestas did stand to benefit from accepting responsibility. Moreover, even if Maestas had only a "dim hope" of receiving a more lenient sentence, such a hope constitutes coercion under Utah's sentencing system where a judge can sentence more harshly if a defendant does not accept responsibility.

The cases cited by the state do not support its claim that Maestas' incriminating statements at sentencing were not compelled. See S.B. at 41, n.19. McGautha, did not address the circumstances in this case. Instead, the issue was whether the long-standing rule that a defendant who testifies at trial can be cross-examined violated the privilege where both guilt and punishment were decided in a single proceeding. The Court

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a defendant who does not take responsibility at sentencing can be sentenced more harshly, sentencing proceedings are inherently coercive and encourage incriminating statements. Utah's system encourages a defendant faced with consecutive sentences to take responsibility for the crimes even if he did not do them; this undercuts the reliability of such statements and further indicates that they should not be relied on by the state to prove its case.

extended the established rule to trials where both guilt and punishment were decided in a single proceeding. McGautha, 402 U.S. at 214-26. In extending that rule, the Court reasoned that the defendant's attorney could make a plea for life if the defendant did not testify. Id. at 219. The present case does not involve an extension of the rule that a defendant who testifies under oath at trial waives his right not to be cross-examined; instead, it involves an examination of the circumstances under which Maestas made allocution statements to determine whether Maestas waived the privilege against self-incrimination so as to allow the admission of his sentencing statements at retrial.

Murphy, 465 U.S. at 436-38, likewise does not support the state's claim. See S.B. at 41, n.19. In fact, when Murphy is read in its entirety, it supports Maestas' claim that his statements at sentencing were compelled. The Murphy Court based its holding that Murphy was not compelled to make incriminating statements regarding other crimes to his probation officer on the fact that under Minnesota law, there is no direct or indirect penalty imposed for exercising the right to silence with a probation officer. Had there been a direct or indirect penalty for remaining silent with a probation officer regarding new crimes, the statements would have been unconstitutionally compelled. Murphy, 465 U.S. at 436-39. Since Utah allows defendants who do not take responsibility to be penalized at sentencing, Murphy indicates that such sentencing statements are not voluntary under the Fifth Amendment.

State v. Strain, 779 P.2d 221, 225-26 (Utah 1989) (S.B. at 41, n.19), also does not

support the state's position because it clarifies that a confession is involuntary if a defendant is threatened with a higher charge if he does not confess. See also State v. Rettenberger, 1999 UT 80, 984 P.2d 1009, ¶29.

Finally, Harvey III, 76 F.3d at 1536, n.5, does not support the state's argument that Maestas' statements were voluntary because: (1) Harvey *conceded* that his allocution statement was voluntary (Id. at 1536); no such concession exists in this case; and (2) a Wyoming court cannot "require a defendant to confess to criminal activities in his allocution in return for a more lenient sentence." Harvey I, 835 P.2d at 1083 . By contrast, failure to confess is a basis for imposing a harsher sentence in Utah.

b. *Maestas' Statements Were Not Voluntary Because He Was Forced to Choose Between Competing Rights.*

Maestas had Article I, sections 7 and 12 rights to speak at sentencing, and since Maestas exercised his right to speak at sentencing, federal due process required that he be allowed to speak.[6] See A.B. at 41-43. Id. Moreover, Maestas had a due process right to a full and fair sentencing. See Williams v. New York, 337 U.S. 341 (1949) (recognizing full and fair sentencing hearing which allows sentencer to impose a sentence which fits the offender and the crime is required by due process); State v. Lipsky, 608 P.2d 1241,

[6] A defendant's right to make an unsworn statement at sentencing is recognized by rule, statute or state constitution in most jurisdictions. LaFave, Wayne R., Israel, Jerold, and King, Nancy J., CRIMINAL PROCEDURE, § 26.4(g) (1984) ("LaFave"). "Despite this widespread acceptance, the Supreme Court has not yet decided whether silencing a defendant who wishes to speak at sentencing is constitutional error." Id. at 779. According to LaFave, "state and federal courts are split on this issue." Id., n.125.

1247 (Utah 1980) ("fundamental fairness requires that [sentencing procedures] be designed to insure that the decision making process is based on accurate information" and punishment fits crime and defendant); State v. Howell, 707 P.2d 115 (Utah 1985) (state due process requires that sentence be based on reliable and relevant information regarding various factors). The state's position forces a defendant to give up these rights and forego a full and fair sentencing hearing in order to preserve the right to appeal and a fair trial on retrial if a case is reversed. Just as forcing a defendant to make a choice between Fourth and Fifth Amendment protections was unacceptable in Simmons v. United States, 390 U.S. 377, 393-94 (1968), this choice in unacceptable.

In support of its argument that forcing such a choice on criminal defendants is no big deal and merely one of the hard choices of being a defendant, the state again relies on McGautha and the spin given that case in the Harvey decisions. S.B. at 33-36. While the right to remain silent was "chilled" in McGautha, the Court did not believe that the impact differed significantly from that in any criminal case where a defendant was required to choose between testifying at trial and foregoing the right against cross-examination. McGautha, 402 U.S. at 213. Each case must be assessed independently, however, to determine "whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." Id.

The policies behind the guarantee of a full and fair sentencing hearing are to ensure that defendants are treated with fairness and dignity and that an individualized

sentence is imposed which fits the crime, the defendant's background and other circumstances. Williams, 337 U.S. at 247. Such an approach serves society's interests by rehabilitating individuals where appropriate, thereby restoring some offenders "sooner to complete freedom and useful citizenship." Id. In a time when prisons are overcrowded and expensive to run, the due process requirement of a full and fair sentencing hearing plays a critical role in helping to identify which offenders are most likely to be rehabilitated by either probation or shorter concurrent sentences. The right to a full and fair sentencing hearing is severely undermined if a defendant stands mute at sentencing in order to preserve his right to appeal and subsequent right to a fair retrial. Conversely, the right to appeal and the right to a fair trial where the state proves through its own resources that the defendant committed the crime are basic to our system of justice. Allowing the use of a defendant's statements at sentencing on retrial after the case is reversed eviscerates these rights.

c. *Maestas Did not Knowingly Waive The Privilege Against Self-incrimination.*

Despite the state's attempts to convince this Court that Maestas "was almost certainly advised of his rights when he was arrested" and "it is inconceivable that trial counsel did not discuss with defendant the dangers of testifying" (S.B. at 41), the record does not demonstrate either of these claims. Given the presumption against waiver and the state's burden to establish that waiver occurred, neither of these presumptions can be

made. See State v. Allen, 839 P.2d 291, 300 (Utah 1992) (burden of establishing waiver is on the state). Additionally, Maestas did not "testify"; unlike Harvey, Maestas was not under oath and instead made an unsworn statement at sentencing. Given the uncertainty of the law in this area, it cannot be presumed that a lawyer would advise his client that sentencing statements would be used at retrial if the case were reversed. Moreover, this trial lawyer was ineffective at trial and failed to file a timely notice of appeal. R. 138-39. Under such circumstances, it cannot be presumed the lawyer advised Maestas that his sentencing statements would be used against him at retrial if his case were overturned on appeal.

The Harvey III, 76 F.3d at 1536, analysis assumes without elaboration that a defendant who speaks at sentencing knows that his statements can be used against him in a different case. While such an assumption is questionable, it does not pertain to the present case where the state seeks to use the statements in the *same* case at *retrial*. Given the fact that this is a case of first impression, such sentencing statements have not been historically admitted on retrial, and even lawyers would be shocked to learn that such a statement could be used after the case is reversed on appeal, it cannot be assumed that Maestas "knew" that his statements made at sentencing would be used against him at a new trial obtained after reversal of his conviction on appeal.

2. Any Waiver Was Limited to the Use of Maestas' Statements for Sentencing Purposes.

The state essentially ignores the recent decision in Mitchell v. United States, 526 U.S. 314 (see S.B. at 42 n. 20), which held that the scope of the waiver of the privilege at a guilty plea colloquy does not extend to sentencing. In fact, "[t]reating a guilty plea as a waiver of the privilege at sentencing would be a grave encroachment on the rights of defendants." Id. at 324. The Court was concerned that if a guilty plea did waive the privilege for sentencing purposes, thereby allowing the government to obtain information from the defendant which was relevant to a harsher sentence, the defendant would become "an instrument in his or her own condemnation, undermining the long tradition and vital principle that criminal proceedings rely on accusations proved by the Government, not on inquisitions conducted to enhance its own prosecutorial power." Mitchell, 526 U.S. at 325 (citation omitted).

In reaching its decision, the Court reasoned:

> There is no convincing reason why the narrow inquiry at the plea colloquy should entail such an extensive waiver of the privilege. Unlike the defendant taking the stand, who "cannot reasonably claim that the Fifth Amendment gives him . . . immunity from cross-examination on the matters he has himself put in dispute," [citation omitted], the defendant who pleads guilty puts nothing in dispute regarding the essentials of the offense. Rather, the defendant takes those matters out of dispute, often making a joint statement with the prosecution or confirming the prosecution's version of the facts. Under these circumstances, there is little danger that the court will be misled by selective disclosure.

Id. at 1312.

Mitchell supports limiting the scope of any waiver which occurs when a defendant

makes a statement at sentencing to use of that statement for sentencing purposes. Just as "[t]here is no convincing reason" (see id.) for extending the waiver which occurs at the plea colloquy beyond that hearing, "[t]here is no convincing reason" (see id.) for allowing the state to shirk its due process responsibility to prove a crime by admitting a defendant's incriminating statements at retrial if the conviction is overturned. A defendant who makes an allocution statement is not "testifying"; indeed, Maestas' statement was not made under oath, subjected to cross-examination, or used for any purpose other than providing the trial court with more complete information for sentencing purposes. To some extent, when Maestas took responsibility, he simply confirmed the state's version of the facts. These circumstances are therefore similar to those in Mitchell and require that the scope of the waiver be limited to use of the incriminating statements for sentencing purposes.

3. Policy Reasons Which Justify Limiting Statements Made at Sentencing to Use for Sentencing Purposes are Similar to the Policy Reasons Which Support Limiting the Use of Statements Which Are Made as Part of the Plea Bargaining Process.

Taylor v. Singletary, 148 F.3d 1276, 1282, n.6 (5th Cir. 1998), refers to the discussion in Gunsby v. Wainwright, 596 F.2d 654 (5th Cir.1979), regarding whether a the defendant's deposition given after a plea bargain failed was involuntary; Taylor does not impact on the Gunsby holding that statements made to the proseeutor while a plea bargain was in place did not voluntarily waive the privilege. See S.B. at 43; A.B. at 38.

In any event, the rationale for not allowing statements made as part of a plea bargain to be admissible if the plea bargain fails is similar to the rationale for disallowing use of a defendant's incriminating statements at retrial. In both circumstances, "the conviction which created the forum for the allocution . . . was reversed" (Harvey I, 835 P.2d at 1094 (Urbigkit, J., dissenting)); since the invalidated conviction "'is deemed never to have existed'", incriminating statements made in reliance on the conviction are not admissible. Id. (Urbigkit, J., dissenting) (citations omitted).

Additionally, when a defendant speaks out at sentencing, the trial court is better able to impose a fair and considered sentence which benefits society, judicial integrity, and the individual defendant. One of the easiest ways for a judge to assess whether the defendant has remorse or takes responsibility for a crime is to allow allocution at sentencing. Requiring that statements made at sentencing are not admissible if the conviction is later overturned facilitates a full sentencing hearing without impacting in any way on the evidence which the state has gathered.

4. Maestas' Incriminating Statements Were the "Fruit" of the Unlawful Convictions.

The "fruit of the poisonous tree" analysis embraced in Harrison v. United States, 392 U.S. 219 (1968), applies in this case because: (1) the probation agent who interviewed Maestas and asked for information about the offense was a state agent (see Utah Code Ann. § 64-13-20 (2000) (DOC agents prepare PSR's); Sargent, 762 P.2d 1127

(Fifth Amendment was violated where confession made to presentence investigator was admitted at retrial and probation officer did not give Miranda warnings prior to presentence review)); the subsequent sentencing statements flowed from that presentence interview; (2) the doctrine applies to judicial proceedings. See Harvey I, 835 P.2d at 1096 (Urbigkit, J., dissenting) ("If Harrison means anything, . . . it is that, like the repressed first trial testimony, an illegal conviction cannot produce admissible evidence upon retrial . . . .")

5. The Victims Rights Amendment Has No Application to this Issue.

As a final matter, the state asserts that suppressing Maestas' statements would result in a denial of the victims' rights. S.B. at 50. Without analysis, the state merely quotes subsection 1(a) of the Utah constitutional "Declaration of the rights of crime victims," then baldly asserts that victims would be treated unfairly if Maestas' incriminating statements are suppressed.[7] S.B. at 50. The state's failure to analyze this issue, provide any support for its claims, or provide citations to the record indicating that this issue was discussed below fails to meet the briefing requirements of Utah R. App. P. 24(a)(9) and Utah R. App. P. 24(b). See State v. Thomas, 961 P.2d 299, 305 (Utah 1998) ("bald citation to authority [without] development of that authority and reasoned analysis

[7] While the state correctly quotes the language of subsection 1(a) of the Declaration, it does not even cite to the correct constitutional provision. The "Declaration of the rights of crime victims" is found in Article I, section 28 of the Utah Constitution, not Article I, section 23, as cited by the state.

based on that authority" does not meet briefing requirements of Utah R. App. P. 24(a)(9)). Because the state has not adequately briefed this claim, this Court should refuse to review it. See id. at 305; see also State v. Montoya, 937 P.2d 145, 150 (Utah App. 1997); Utah R. App. P. 24(a)(9) applicable to brief of Appellee pursuant to Utah R. App. P. 24(b).

In Montoya, 937 P.2d at 150, the Court of Appeals declined to address an argument raised by the state for the first time in its response brief, stating:

> A well-briefed argument is most essential for an issue raised by appellee for the first time on appeal because the new issue has not been addressed by the parties below and thus record support for the unaddressed argument is critical. Additionally, "'[i]f the court is not supplied with the proper tools to decide cases, then extremely valuable time, already severely rationed, must be diverted from substantive work' into less productive tasks. [citations omitted]."

Id. Additionally, in the absence of an adequately briefed argument, the chance that the appellate court will issue case law which must later be clarified increases significantly.

Although the Victims' Rights Amendment went into effect January 1, 1995, it has been subjected to very little appellate review.[8] This Court should refuse to move into this area of first impression where the state has failed to adequately brief its argument or to otherwise provide support for such a far-flung interpretation of the constitutional provision. In addition, even if this Court were to reach the substance of the state's claim,

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[8] State v. Beltran-Felix, 922 P.2d 30 (Utah App. 1996), in which the Court of Appeals considered whether the victim's presence at a juvenile trial violated the defendant's right to a fair trial, is the only Utah appellate decision discussing the amendment.

that claim fails because Article I, section 28 does not provide the protection advocated by the state. Indeed, the amendment does not suggest that the rights of victims override the constitutional protections afforded criminal defendants or that in order to treat victims fairly, courts must aid the state in obtaining a conviction by admitting a defendant's statements obtained at sentencing. Furthermore, conducting a fair trial under applicable rules, statutes and constitutional provisions results in fair treatment to both victims and defendants since victims have an interest in reliable convictions.

The focus of the Victim Rights' Amendment is on preserving the dignity of victims by including them more in the process by giving them notice of proceedings, and allowing them to be present and/or give input under certain circumstances. Utah Const. Art. I, § 28. This focus is evident in the Rights of Crime Victims Act found in Utah Code Ann. § 77-38-1 through 14 (1999). Neither the Act nor the constitutional amendment suggests that issues regarding the constitutional or statutory admissibility of evidence should be decided on the basis advocated by the state.

6. This Court Could Also Use Its Inherent Supervisory Power to Preclude Admission of Such Statements.

Although the state and federal constitutions and Utah statutes preclude the use of Maestas' statements at retrial, this Court could also exercise its inherent supervisory power to hold that a criminal defendant's statements made at sentencing or as part of the presentence investigation are not admissible at retrial following reversal of a conviction

on appeal. This Court has *sua sponte* exercised its inherent supervisory powers in resolving issues where fairness and policy considerations require a certain approach regardless of whether such an approach is constitutionally or statutorily mandated. See State v. Bennett, 999 P.2d 1, 2000 UT 34, ¶13 (Durham, J., concurring in the result) (listing numerous circumstances under which this Court has exercised its inherent supervisory power). Indeed, this Court has repeatedly recognized that it has "inherent supervisory authority over all courts of this state" (State v. Thurman, 846 P.2d 1256, 1266, 1271-72 (Utah 1993)) and has utilized that power in criminal cases to ensure that proceedings in the trial court are conducted in a fair and consistent manner. See e.g. State v. Wareham, 772 P.2d 960, 965 (Utah 1989); In re Criminal Investigation, 7th Dist. Court No. CS-1, 754 P.2d 633, 653 (Utah 1988).

Important considerations support using this Court's inherent supervisory powers to preclude the use of a defendant's statements which are made at sentencing in a subsequent retrial. These considerations include, among other things: (1) the importance of a full and fair sentencing hearing, and the fact that defendants who are appealing their cases would not speak at sentencing if this Court were to hold that such allocution statements are admissible on retrial; (2) the unfairness of using the statements of a defendant who speaks out at sentencing against him if the conviction is overturned, (3) concerns about the reliability of incriminating statements made at sentencing after conviction where such statements are not made under oath, and are often made because

otherwise the defendant can be sentenced more harshly, and (4) the due process requirement that the state, with all of its resources, prove its case beyond a reasonable doubt and the importance of that requirement. In order to preserve the right to appeal, the right to a fair trial, the right against self-incrimination and the right to a full and fair sentencing hearing, among others, this Court should at the very least hold pursuant to its supervisory power, that a defendant's statements made at sentencing are not admissible after the case is reversed on appeal.

CONCLUSION

Defendant/Appellant Gino Maestas respectfully requests that this Court reverse the trial court's interlocutory orders and (1) allow Appellant the opportunity to introduce expert testimony in support of his identification defense, and (2) preclude the state's use of his sentencing statements at retrial.

SUBMITTED this 12th day of March, 2001.

JOAN C. WATT
SCOTT C. WILLIAMS
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be hand-delivered ten copies of the foregoing to the Utah Supreme Court, 450 South State Street, 5th Floor, P.O. Box 140210, Salt Lake City, Utah 84114-0210, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 12th day of March, 2001.

Joan C. Watt

JOAN C. WATT

DELIVERED to the Utah Supreme Court and the Utah Attorney General's Office as set forth above this _____ day of March, 2001.

_____

ADDENDUM A

64-13-20. Investigative services — Presentence investigations and diagnostic evaluations.

(3) (a) The presentence diagnostic evaluation and investigation reports prepared by the department are protected as defined in Section 63-2-304 and after sentencing may not be released except by express court order or by rules made by the Department of Corrections.

(b) The reports are intended only for use by:

(i) the court in the sentencing process;

(ii) the Board of Pardons and Parole in its decisionmaking responsibilities; and

(iii) the department in the supervision, confinement, and treatment of the offender.

CONSTITUTION OF UTAH

Sec. 28. [Declaration of the rights of crime victims.]

(1) To preserve and protect victims' rights to justice and due process, victims of crimes have these rights, as defined by law:

(a) To be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process;

(b) Upon request, to be informed of, be present at, and to be heard at important criminal justice hearings related to the victim, either in person or through a lawful representative, once a criminal information or indictment charging a crime has been publicly filed in court; and

(c) To have a sentencing judge, for the purpose of imposing an appropriate sentence, receive and consider, without evidentiary limitation, reliable information concerning the background, character, and conduct of a person convicted of an offense except that this subsection does not apply to capital cases or situations involving privileges.

(2) Nothing in this section shall be construed as creating a cause of action for money damages, costs, or attorney's fees, or for dismissing any criminal charge, or relief from any criminal judgment.

(3) The provisions of this section shall extend to all felony crimes and such other crimes or acts, including juvenile offenses, as the Legislature may provide.

(4) The Legislature shall have the power to enforce and define this section by statute.